

F8ITAGUA

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 AGUDAS CHASIDEI CHABAD OF THE
4 UNITED STATES,

5 Plaintiff,

6 v.

15 MC 184 P1

7 RUSSIAN FEDERATION, et al.,

8 Defendants.

9 New York, N.Y.
10 August 18, 2015
11 11:00 a.m.

12 Before:

13 HON. KATHERINE P. FAILLA,

14 District Judge

15 APPEARANCES

16 ROTHWELL FIGG
Attorneys for Plaintiff
BY: DANIEL McCALLUM

17 DAVIS & GILBERT
Attorneys for Movant Sberbank CIB USA, Inc.
18 BY: JAMES SERRITELLA
CHRISTOPHER MEYER
19
20
21
22
23
24
25

F8ITAGUA

(In open court)

DEPUTY CLERK: We're here in the matter of Agudas Chasidei Chabad of the United States versus Russian Federation, et al.

Counsel, please identify yourselves for the record, beginning with the movant.

MR. SERRITELLA: Good morning, your Honor, James Serritella from Davis & Gilbert on behalf of non-party movant Sberbank CIB USA, Inc. I have with me my colleague, Christopher Meyer.

THE COURT: Good morning to both of you, thank you.

MR. McCALLUM: Good morning, your Honor, Daniel McCallum from Rothwell Figg on behalf of Chabad, the movant on the Rule 45(f) motion opposing the motion for the protective order and the plaintiff in the underlying litigation before Judge Lamberth.

THE COURT: Before you sit down, sir, I want to ask you about that litigation, because I suspect you have more knowledge of it than the folks at the front table.

Can you tell me, please, or could you provide more detail to what is said in your submissions regarding proceedings that you have in the near term before Judge Lamberth on this case.

MR. McCALLUM: Yes, your Honor. On August 7, Judge Lamberth issued an order scheduling a hearing on August 20,

F8ITAGUA

1 this coming Thursday. And there has been pending before Judge
2 Lamberth a motion for an interim order accruing -- there's been
3 sanctions accruing since 2013 where Judge Lamberth issued
4 sanctions against the Russian Federation of \$50,000 a day.
5 Chabad moved for that sanctions order to memorialized into a
6 judgment so there could be one number, and that hearing is
7 before Judge Lamberth I believe 2:00 p.m. this coming Thursday.
8 I'm not sure what other matters the judge may take up, but that
9 is the purpose of that hearing.

10 THE COURT: And just so I'm understanding what is
11 going on, is it going to replace the prior order that was
12 entered with the default judgment imposing a fixed sum and
13 going to aggregate all of the \$50,000 a day that's been
14 accruing in sanctions as of Thursday?

15 MR. McCALLUM: So there's two things, there's the
16 underlying judgment, he issued a judgment in 2010, and that is
17 the judgment on Chabad's actual papers, the issuing order that
18 Chabad is entitled to those papers that the Russian Federation
19 has.

20 THE COURT: Let me stop you for a moment. That order,
21 it's the library and the artifacts, or is there a monetary
22 value that's been assessed for them?

23 MR. McCALLUM: No, your Honor is correct, it's just
24 Chabad's papers, the library and the archive.

25 THE COURT: Separate and apart from that, because of

F8ITAGUA

1 the non-participation of the Russian Federation, there has been
2 a contempt order issued, and Judge Lamberth has found,
3 beginning in 2013, that there's a \$50,000 per day sanction,
4 correct?

5 MR. McCALLUM: Yes.

6 THE COURT: And this Thursday is adding up that
7 sanction?

8 MR. McCALLUM: That is what Chabad has moved for.

9 THE COURT: Aspirationally that's what you're going
10 for.

11 MR. McCALLUM: Correct.

12 THE COURT: Would the thought be another year or six
13 months from now you will have another proceeding to add up some
14 more?

15 MR. McCALLUM: Perhaps. Our wishful thinking is that
16 we would not need that and we would have the collection by that
17 time. If necessary.

18 THE COURT: I'm sorry to have not even thought of that
19 as a possibility.

20 Okay. Thank you very much. And why don't you have a
21 seat for a moment and let me talk to both sides.

22 I have gotten two different sets of papers, as you are
23 aware, there is a motion for protective order and more recently
24 a motion for transfer to the District of Columbia. I have read
25 the papers. I do want to talk to the parties a little bit

F8ITAGUA

1 about this and then we'll see what happens.

2 What I will ask is if and to the extent any of this is
3 useful to Judge Lamberth, perhaps the parties will arrange at
4 the close of these proceedings to get a transcript of this
5 conference, but we'll see. Perhaps, if you excuse my
6 grandmother's expression, we'll burn that bridge when we get to
7 it.

8 Mr. McCallum, I want to talk to you on the protective
9 order motion. Let me ask, Sberbank is this broker-dealer
10 entity in the United States, is there -- at least that's how
11 it's been described to me -- anything else in the United
12 States, sir?

13 MR. McCALLUM: Not that I'm aware of, although we did
14 point out in the papers that it's Sberbank CIB, the corporate
15 business, the Russian entity, as noted on its web site, that it
16 has a New York office, and I took that to be the New York
17 entity that is here today, Sberbank USA.

18 THE COURT: Let me ask you this, sir, and we may be
19 running up on the limits of my own knowledge, but I remain
20 fascinated by the Daimler v. Bauman decision issued a couple
21 years ago and the issue of general jurisdiction and the entity
22 being at home in a particular place. And I didn't think that
23 CIB -- and I will use that for the moment to distinguish the
24 Russian entity from the affiliate that's before me -- I didn't
25 get the sense that they were at home in New York. Do you

F8ITAGUA

1 disagree, sir?

2 MR. McCALLUM: Well, your Honor, I think that raises a
3 separate issue, because the entity that we subpoenaed here was
4 Sberbank USA, and that is who Mr. Serritella is representing.
5 And we are seeking the documents and information from the
6 Russian entities under the doctrine of custody and control.

7 So I don't think your Honor needs to address whether
8 Sberbank CIB, the Russian entity, would be at home in this
9 district. I think perhaps if we had subpoenaed them and served
10 them with a subpoena here they would be under a different
11 jurisdictional analysis, and your Honor, I just don't want to
12 speculate whether under Daimler they would be at home here.

13 THE COURT: And I certainly don't want you to
14 speculate, especially given that I sprung this question on you
15 this morning.

16 Why I was thinking that, sir, is one of the things
17 that interests me about Daimler or Bauman, depending who you
18 are and how you want to refer to it, is the idea is that
19 discovery orders are somewhat coextensive with the personal
20 jurisdiction that a court has over an entity. If I don't have
21 jurisdiction over CIB, am I doing an end run around Daimler by
22 allowing a subpoena to be issued to its U.S. affiliate to be
23 the gateway for information about CIB? That's really my
24 question.

25 MR. McCALLUM: I don't think so, your Honor, because I

F8ITAGUA

1 don't think Daimler was a complete reworking of the law. And
2 prior to Daimler and the cases we cite there are these numerous
3 cases that discuss getting information and documents from an
4 entity based on the custody and control standard that the
5 subsidiary or the parent has access and ability to access
6 documents from the other entity. And so I don't think what
7 we're doing here is an end run, no, your Honor.

8 THE COURT: And you have talked to me about custody
9 and control, and you defined it as access or ability to access,
10 but I think your adversaries in this proceeding at least have
11 spoke about it more in terms of whether in the ordinary course
12 of business the affiliate in the U.S. had occasion to have
13 access to this information. I want to make sure I understand
14 your argument about the metes and bounds of what is custody and
15 control for these purposes.

16 MR. McCALLUM: Yes, the case law states that the
17 custody and control standard is met when there's -- among other
18 circumstances, when the party at issue has access or the
19 ability to access the documents and information that the movant
20 is seeking.

21 THE COURT: But let me stop you for a moment, sir,
22 because I guess my concern is that would suggest -- well, it
23 would be the rare company, I would think, where an affiliate
24 would not be able at least to ask for access to documents held
25 by another affiliate by the parent. Perhaps I'm not as

F8ITAGUA

1 familiar with companies that have a more stringent sharing of
2 information policy, but it would seem to me that any affiliate
3 could say as to its fellow affiliates it has the ability to ask
4 for the information. I would have thought it required more
5 than that.

6 MR. McCALLUM: It could be the ability to ask and
7 receive. And that is one thing that Sberbank has not said
8 here, as we noted in our reply papers, that they said they do
9 not access -- the active tense of the verb -- in the ordinary
10 course of the business, without elaborating what that phrase
11 means. They did not say the opposite, that they do not have
12 access to that information.

13 And for example, in the SEC v. Bancorp case that they
14 cite to, the court went through pains to explain the entity
15 could not access that information. Here we don't have any
16 statements from Mr. Levy -- Mr. Levy being the declarant both
17 in support of Sberbank's moving papers and in reply papers --
18 and in the reply papers he does not say they cannot access, he
19 says they do not access. And we submit that the correct
20 standard is the ability to access on request or otherwise.

21 THE COURT: So if Mr. Meyer or his colleague said to
22 me today no, we can't access it, that would matter?

23 MR. McCALLUM: Well, I think it would matter. But,
24 your Honor, I submit that we would still need -- although I
25 respectfully would believe what my colleague would say, that

F8ITAGUA

1 would be a topic I think that would warrant the deposition to
2 explore the bounds of that, given we have two declarations
3 where that has not come up.

4 THE COURT: You led me to my next question, sir, which
5 is I think what I'm understanding from your papers or response
6 to be is not that you are necessarily going to come down and
7 force the production of documents, but at this time really what
8 you're seeking is simply information. You want confirmation of
9 the statements made in these papers and you want to understand
10 better why it is they believe -- Sberbank USA believes it does
11 not have the ability or it would not be appropriate for them to
12 give you documents regarding CIB. Is that correct?

13 MR. McCALLUM: Yes, your Honor. I think the scope of
14 the deposition would be what information can Sberbank USA
15 access from its Russian entity and what type of information
16 that Russian entity does in fact have. We would submit that it
17 would be proper for them to learn that information before the
18 deposition as well as exploring the balance of what it can get
19 access to. And as your Honor correctly predicts, in the event
20 that they do have such information and such documents, perhaps
21 that would be the next step, but we believe this is the most
22 efficient way to do things.

23 THE COURT: Sir, so you don't have to keep standing up
24 and sitting down, may I hear from you, please, on the motion to
25 transfer. In particular, sir, I want to understand the nature

F8ITAGUA

1 of the current proceedings, which I hinted at in my first
2 question to you, and the contemplated proceedings before Judge
3 Lamberth, and why you believe that it makes sense to have this
4 matter transferred to him.

5 MR. McCALLUM: So I think there are two interrelated
6 reasons for transferring this. First is, as your Honor
7 previewed it, Judge Lamberth's overall familiarity with the
8 case. And we noted that there are detailed facts in this case
9 going all the way back to the Bolshevik Revolution in 1917 that
10 Judge Lamberth detailed in his opinions.

11 THE COURT: I'm sorry to cut you off, but he doesn't
12 need to know about the Bolshevik Revolution or the facts in the
13 case relating to that in order to address the issues of the
14 interrelationship or not between these entities and Sberbank,
15 does he?

16 MR. McCALLUM: It does not directly go to the legal
17 question here, it will help inform his judgment. And also
18 Judge Lamberth's rulings have dealt extensively with the
19 Foreign Sovereign Immunities Act. So to the extent there are
20 issues with the underlying facts or anything that could impact
21 the Foreign Sovereign Immunities Act, his knowledge will help
22 deal with that.

23 And turning to the advisory committee notes to Rule
24 45(f), and in Rule 45(f) itself there's the idea of whether
25 issues are likely to arise again such that there might be the

F8ITAGUA

1 possibility of inconsistent rulings. The advisory committee
2 notes that to avoid inconsistent rulings, a transfer may be
3 appropriate to the court issuing the subpoena.

4 And we submit that that is precisely the situation
5 here because, as your Honor is aware, we subpoenaed Sberbank
6 USA, a US entity, seeking information from the corporate parent
7 as well. We're seeking information about Russian assets. So
8 it is likely that -- Chabad does intend to subpoena other
9 entities, and we have in fact subpoenaed other entities, that
10 other entities would raise this defense as well. So to the
11 extent that one court, that being Judge Lamberth, could rule on
12 these issues, we believe it makes sense and is consistent with
13 what Rule 45(f) states.

14 THE COURT: Mr. McCallum, let me ask you this perhaps
15 more pointedly than I mean to. I think I understand you to be
16 saying that at this stage in the litigation you're not
17 necessarily expecting that the Russian Federation will come in
18 and restart its defense of the matter, and instead your
19 litigation has progressed to the point of being an exploration
20 basically of post-judgment remedies and you're exploring where
21 assets might be. Is that correct, sir?

22 MR. McCALLUM: Yes, your Honor. And I think you're
23 possibly highlighting something that was raised by Sberbank in
24 its opposition papers, and this is the idea of the merits stage
25 of litigation versus the enforcement stage.

F8ITAGUA

1 THE COURT: I know that is what they said. I'm
2 highlighting it for a different reason, sir, because now
3 there's a subpoena to Sberbank, there's a subpoena to Ketchum,
4 and you hinted in your papers that more will be coming.

5 I think what I'm trying to understand, sir, is are you
6 telling me now that for the foreseeable future in this
7 litigation your client's efforts will be directed at obtaining
8 information from entities who have some tie to the Russian
9 Federation or its accounts so you can figure out if there are
10 any assets here on which you can make a claim?

11 MR. McCALLUM: That's correct.

12 THE COURT: It's not for the reasons he said, although
13 I know his point. I'm trying to figure out if you're telling
14 me this is the beginning of a phase of litigation where all
15 you're really going to be doing is asking for information from
16 people. Because I presume what you're saying is that dovetails
17 with the notion that Judge Lamberth should be deciding these
18 issues. I'm not saying I agree with that, but that's the
19 argument you're making, correct, sir?

20 MR. McCALLUM: You're correct.

21 THE COURT: Is that exceptional circumstances, sir?

22 MR. McCALLUM: Well, we contend that under the
23 committee notes it does state that the same issues are likely
24 to arise again. And in Wultz it was aspirational. It was not
25 that the same issues had already arisen, it was that in the

F8ITAGUA

1 Wultz case in the District of Columbia that they stated they
2 intended to subpoena additional Israeli officers, and that
3 therefore the state secret issue that was pending before the
4 court there on a motion to quash was likely to arise again, and
5 it made sense for the Southern District of New York to handle
6 all those because that was where the litigation was pending.

7 We believe that our cases parallel here because
8 Sberbank has raised this issue of intercorporate subpoena
9 compliance, and we intend to and plan to subpoena additional
10 entities. So to the extent those additional entities raise the
11 same defense, that issue is likely to arise, and we would like
12 to avoid inconsistent rulings.

13 THE COURT: I'm not saying that's a bad thing. I
14 guess I'm turning for a moment to the advisory committee notes
15 to the amendment, and I thought one of the things that they
16 said was that one of the principal issues -- yes, here it is,
17 the protection of local non-parties. And in fact, it says the
18 prime concern should be avoiding burdens on local non-parties
19 issuing -- sorry, local non-parties subject to subpoenas, and
20 it should not be assumed that the issuing court is in a
21 superior position to resolve the interrelated motions.

22 Could you speak to that issue, sir, because I believe
23 the local non-party issue is something that was raised by
24 Mr. Serritella and Mr. Meyer, and I thought I understood you to
25 be saying that they're not the local non-parties that are

F8ITAGUA

1 contemplated by this rule. I would like to understand that a
2 little better, sir.

3 MR. McCALLUM: Yes, your Honor. So in several cases,
4 and in the short time span that Rule 45(f) has been in effect,
5 we cite the Judicial Watch case and we cite to others where the
6 idea that a national entity is not really the type of entity
7 that was considered a local party such that local interests
8 under Rule 45(f) were being contemplated.

9 Sberbank USA is, to be sure, the arm of a Russian
10 international bank. And while it is located here in New York,
11 we submit that it is not the type of local entity that Rule
12 45(f) contemplates because of its international presence in
13 connection to international entities. And relatedly, other
14 courts have stated that to the extent there is any type of
15 burden, it could be alleviated through perhaps a telephonic
16 hearing with counsel for Sberbank USA.

17 And I think most importantly is that we're not
18 contending that Sberbank USA has to comply with the subpoena in
19 the District of Columbia. So in the event the order was
20 transferred and it was not -- the protective order was not
21 enforced and the deposition were to go forward, that could
22 occur here in the Southern District of New York, minimizing any
23 burdens to the actual entity itself.

24 THE COURT: Thank you very much. Let me talk to
25 whoever is taking the laboring oar at the front table.

F8ITAGUA

1 Mr. Serritella.

2 MR. SERRITELLA: Good morning, your Honor.

3 THE COURT: If you could help me and tell me, am I
4 unnaturally fixating on balance, sir? You can tell me, I won't
5 be offended.

6 MR. SERRITELLA: Let me clear the air, Sberbank USA is
7 a distinct and separate entity. It's a Delaware corporation.
8 It's headquartered in New York. So we're talking about a US
9 entity here. It's not a Russian entity. And so I think the
10 point here is that the plaintiff is trying to get access to
11 documents or information in the hands of the Russian parent,
12 the indirect Russian parent, Sberbank Russia. And Sberbank USA
13 doesn't have that information, it operates separate and
14 distinctly from Sberbank Russia. It's a 17-man office in New
15 York. It's a broker-dealer. It has a very specific operation.

16 THE COURT: Could you give me a sense, sir, of the
17 size of the Russian entity? I assume some hundreds or
18 thousands.

19 MR. SERRITELLA: I think it's the largest bank in
20 Russia.

21 THE COURT: Okay.

22 MR. SERRITELLA: The point I was making, your Honor,
23 is this entity has a very limited role in the United States.
24 They trade securities on behalf of US clients that want
25 exposure to Russian stocks, and that's really what their

F8ITAGUA

1 operation is focused on. They don't have access to account
2 level information in the hands of any affiliate, any foreign
3 affiliate. And so it's really a limited role that they serve
4 here, and they operate distinctly from what is going on in
5 Russia.

6 THE COURT: Can I understand, you just said the magic
7 words, "They don't have access." Are you saying there's no set
8 of circumstances under which they could obtain access, or are
9 you going to tell me this is the ordinary course of business
10 argument you were making in your papers?

11 MR. SERRITELLA: To answer your question, your Honor,
12 I think your Honor touched on something that was the point I
13 was going to raise, that if you said the standard was simply
14 could an entity access information in the hands of an
15 affiliate, then you would throw the standard control out the
16 window. You could have an entity respond to discovery requests
17 on behalf of any affiliate, because "could access," what does
18 that mean? That's not the standard anyway. I think the cases
19 consistently make clear when you're requiring an entity to
20 respond on behalf of a parent or any affiliate, the question of
21 control turns on whether that party could access that
22 information in the ordinary course of business and was involved
23 in the transaction at issue. That's not going on here.

24 THE COURT: Sorry, you added another thing. I heard
25 about the ordinary course of business, but then you said "and

F8ITAGUA

1 was involved in the transaction." I don't know that I read
2 that anywhere.

3 MR. SERRITELLA: Let me clarify. In those cases there
4 was an underlying transaction where, in the cases where the
5 courts say that the party does have to respond on behalf of an
6 affiliate, the parents were actually involved in the
7 transaction. I think in the Camden Iron case that the
8 plaintiffs cite, which by the way does not support their
9 argument that it could access the standard, if you look at that
10 case, the parent actually was involved in negotiating the deal.
11 When there was a breach of contract, the Court said wait a
12 minute, you were involved in this deal so of course you have to
13 respond to the discovery request because it was a free flow of
14 information in the ordinary course of business.

15 What is different in this case is that we're not
16 talking about a transaction, we're actually talking about
17 account level information in the present. That's what the
18 plaintiff wants. And so to get into whether or not there's
19 access now or then or whatever, all that matters is can we
20 access this information presently in the ordinary course of
21 business. And the record here clearly shows that Sberbank USA
22 cannot because it's not involved in the affairs of the Russian
23 parent.

24 And so I think that ends the analysis right there.
25 They don't get a deposition. They don't get to depose our

F8ITAGUA

1 witness and make that witness testify as to information in the
2 hands of the Russian parent because there's no access to that
3 information.

4 THE COURT: I understand that argument. I guess I
5 want to modify it slightly. I understand what Mr. McCallum was
6 seeking to do in this deposition was really probe what access
7 the US entity had.

8 MR. SERRITELLA: But that's not necessary.

9 THE COURT: Because why? Because your submissions are
10 enough?

11 MR. SERRITELLA: Yes. The standard is access in the
12 ordinary course of the business.

13 THE COURT: What if he doesn't believe you, or what if
14 he wants to see -- what if you've done things under a
15 particular standard and he wants to try it under a more
16 expansive standard?

17 MR. SERRITELLA: I think that's a separate issue, your
18 Honor, and the plaintiff never indicated they don't believe
19 what is in that declaration, so I don't see that that's
20 relevant.

21 THE COURT: Fair enough. But if they held a different
22 view from you about what custody or control meant, could they
23 not probe it in the deposition? They're not today asking for
24 the documents, they're asking for this deposition.

25 And I was wondering also if you could speak to the

F8ITAGUA

1 related issue about how complicated this deposition would be.
2 Because I understand it's a burden. You being here today is a
3 burden, it's a question how much of a burden is permitted.

4 MR. SERRITELLA: I think that the answer to your
5 question is that it doesn't matter. It doesn't matter. What
6 matters is: What is the standard? The standard that the
7 plaintiff is proposing is incorrectly legally. So you can't --
8 the plaintiff can't propose an incorrect legal standard to get
9 a deposition. That's essentially what they're trying to do.
10 You have to look at the law. And the law says that you only
11 have to provide information on behalf of an affiliate if you
12 have access to that information in the ordinary course of
13 business. So to put the cart before the horse to say let's get
14 a deposition to find out what they really have access to based
15 on an improper, incorrect legal standard doesn't fly.

16 THE COURT: Fair enough. Are you also saying, sir,
17 that given you win, or you believe you win on the standard, the
18 fact that it's not an especially burdensome deposition --
19 because in a quiet moment you could say it wasn't an especially
20 burdensome deposition -- you say that's not enough because they
21 shouldn't be able to get even a not burdensome deposition on
22 this basis.

23 MR. SERRITELLA: I think your Honor touched on
24 something regarding burden. My client spent a lot of resources
25 responding to the subpoena. We actually attempted to get the

F8ITAGUA

1 plaintiff to narrow the scope of the subpoena on several
2 occasions and they refused to do so, so we were left with no
3 choice but to go into court and seek a protective order.

4 So at this point the burden is getting greater and
5 greater. And then on top of today to sit for another
6 deposition and incur additional costs just isn't fair to my
7 client. And Rule 45, in our view, protects them from that.
8 Because if the deposition were limited to what the plaintiff
9 actually asked, which is information in the actual possession
10 of our client, they would be told what they already know and
11 what they don't contest. And that's our claim. Doesn't have
12 any information that's responsive to the subpoena, with the
13 exception of an organizational chart.

14 But to get at the real meat of what they're trying to
15 do, which Mr. McCallum talked about, which is enforce a
16 judgment and to find accounts to levy against, which they
17 stated that's what they're trying to do, our client holds no
18 accounts in the names of the defendants. So a deposition would
19 be pointless because they would be told the same thing they're
20 not contesting here.

21 THE COURT: Let's say hypothetically that you had the
22 access to information but you yourself had no access to the
23 accounts, so are you saying that the most that you could
24 provide to Mr. McCallum is perhaps some accounts where there
25 are some funds that you would not be able to accept a levy upon

F8ITAGUA

1 given your client's business?

2 MR. SERRITELLA: I think, to be clear, first, we're a
3 broker-dealer that doesn't have any broker-dealer accounts in
4 the names of those defendants.

5 THE COURT: And you also say you have no account
6 information for the other accounts for the other services that
7 Sberbank provides.

8 MR. SERRITELLA: Correct. And I think that the record
9 clearly shows that. So to answer your question is yes.

10 THE COURT: Maybe this is not a fair hypothetical, but
11 I will ask it nonetheless: If you could provide the
12 information but you could not be an entity on whom a levy could
13 be served, do you still have to provide that information?
14 Let's say that you had access to this information but they're
15 not your accounts, and even if they found all the money they
16 were looking for, they couldn't levy on you, does that mean they
17 don't get the information?

18 MR. SERRITELLA: I think that's a separate question,
19 because we don't have to get there, your Honor, because we
20 don't have access to the information. That's the point. And
21 the actual information that we have in our possession isn't
22 responsive to what they're seeking and it doesn't show that in
23 the accounts where they can levy against. So that ends the
24 analysis right there.

25 THE COURT: Okay. Could we please switch to the

F8ITAGUA

1 transfer motion. You've heard my questions to Mr. McCallum
2 regarding what he anticipates taking place this week and
3 perhaps in the near term before Judge Lamberth. Whatever you
4 would like to tell me about that, sir.

5 MR. SERRITELLA: Your Honor, I think that what we
6 should be focusing on for this motion is what exceptional
7 circumstances mean, which is what your Honor asked. And the
8 courts have followed the advisory committee rules that describe
9 what sort of exceptional circumstances means, and it
10 essentially comes down to the disruption of management of the
11 underlying litigation.

12 First of all, the underlying litigation is over. It's
13 ended.

14 THE COURT: I'm sorry, I don't mean to disagree with
15 you, sir, but there is some reason why Judge Lamberth has a
16 conference scheduled for this week. It's not entirely over.
17 The case may be closed in the docket system, but he is still
18 doing stuff with it.

19 MR. SERRITELLA: But I think what your Honor was
20 getting at before was the enforcement stage of the litigation.
21 Plaintiff cited no authority for the proposition that there are
22 exceptional circumstances when you're getting into enforcement
23 of a judgment against potential creditors.

24 But why don't we get into the two factors that courts
25 look at for disruption, and one of which is: Are the same

F8ITAGUA

1 issues that are at issue in the motion to quash a protective
2 order, are they going to be addressed by the -- or have they
3 been addressed by the underlying court? And the answer here is
4 absolutely not. As a matter of fact, there's been no discovery
5 in the underlying litigation, there's been no motion practice
6 regarding any discovery issues whatsoever.

7 But taking a step further, what is really at issue
8 here is talking about access to documents in the possession of
9 a foreign parent. And that issue has not come up. And even in
10 what the plaintiff has just submitted two weeks ago, the issue
11 there of access is never -- of a foreign parent is never going
12 to come up because Ketchum is a United States entity and its
13 parent is located in the United States. So there's no issue of
14 foreign access with regard to that entity.

15 And so I think what it comes down to is there are no
16 exceptional circumstances because the Court here would be
17 addressing the access issue for the first time and potentially
18 the only time, and the plaintiff is saying that they're going
19 to potentially send out subpoenas. But other than the one we
20 just identified, there are no other subpoenas, and there's no
21 indication that this issue will come up because that's what
22 matters, this issue of access. So given that it's not going to
23 come up, there's no justification of transfer to the issuing
24 court.

25 THE COURT: You said there are two points, I want to

F8ITAGUA

1 make sure I have both of them. The first is the issues were
2 not arising before the district judge, and the second is the
3 Ketchum case --

4 MR. SERRITELLA: The second issue, to clarify, is the
5 issues wouldn't come up in any other districts. So what other
6 districts are there besides this district where we have a
7 subpoena? It's only here.

8 THE COURT: Okay. Anything else that you would like
9 to tell me on the transfer application?

10 MR. SERRITELLA: Your Honor, I would like to respond
11 to the one case that -- or the two cases that the plaintiff
12 cites in his papers. The first is the Wultz case. That case
13 is completely distinguishable from this case. In Wultz the
14 court was involved -- the clients were where the motion to
15 quash was made, the issuing court rather, that court was
16 already involved in the issue of access to state secrets. As a
17 matter of fact, the two depositions that were already
18 identified or noticed dealt with the same exact issue. And I
19 believe in that underlying litigation there were six related
20 actions. So under those circumstances there were exceptional
21 circumstances because the court was already dealing with the
22 issues. There were a number of related cases. It was a
23 complex litigation. There's nothing like that going on here.
24 This is a simple motion for a protective order where the issue
25 of access is coming up for the first time.

F8ITAGUA

1 And then with regard to the Judicial Watch case that
2 the plaintiff mentioned, that case actually was an ongoing
3 litigation for four years, and the issue there of privilege by
4 communicating with a state legislator was already addressed in
5 the underlying court, among many other discovery issues that
6 were similar to issues brought in the motion to quash. So
7 again, that case was completely distinguishable and doesn't
8 support the plaintiff's argument there are exceptional
9 circumstances.

10 And I also add I don't hear that term at all. If you
11 look at the papers there is no discussion of exceptional
12 circumstances. The only thing we heard is a discussion of
13 judicial economy. But as your Honor points out, Rule 45 is
14 designed to protect the local party to give the local party the
15 ability to go into court and challenge a subpoena so that
16 they're not overly burdened going to another court. So there's
17 a presumption against transfer unless you can show the
18 exceptional circumstances. And while judicial economy might be
19 a reason or basis for allowing a transfer, it's not the
20 standard that the Court would have to look at. So given all of
21 that, there's no basis for transfer here whatsoever.

22 THE COURT: Thank you very much.

23 Mr. McCallum, Mr. Serritella raises an interesting
24 point, which is that Ketchum is not going to be another entity
25 in which access to information of a foreign or domestic issue

F8ITAGUA

1 is going to come up. So I would like to hear from you on that.
2 I also want to understand, are there more of these subpoenas
3 that you contemplate issuing, and will any them implicate the
4 issues that have brought these folks and you here today?

5 MR. McCALLUM: Yes, your Honor. First, with respect
6 to Ketchum, that subpoena, the time for complying has not yet
7 come to pass. I believe it's August 20, this coming Thursday.
8 But I can argue that -- and Mr. Serritella is unaware of this
9 because I did not put it in the papers, but in discussions with
10 Ketchum they have stated that they're volunteering information
11 from their UK entity, who was one of the entities that did work
12 on behalf of the Russian government. So while they have so far
13 not indicated that they are going to oppose on the same issue,
14 they have in fact volunteered to provide that information, and
15 that has not yet come to pass.

16 THE COURT: That means Judge Lamberth is not going to
17 have to decide that issue, right?

18 MR. McCALLUM: Assuming they comply and agree with
19 that, then yes, your Honor.

20 THE COURT: Go ahead.

21 MR. McCALLUM: With respect to additional subpoenas,
22 your Honor's second point, we do intend to send out additional
23 subpoenas for the reasons we stated in our papers and here
24 today. Sberbank was a specific target because of all of its
25 ties with the Russian government in Russia. We have not done

F8ITAGUA

1 the shotgun approach to subpoenas, but we are taking steps to
2 find additional entities. For example, we submitted a FOIA
3 request trying to find information in regard to different
4 entities whose assets have been frozen under the Ukrainian
5 sanction regime. Presumably when we get information from there
6 and start getting information back we'll look at those entities
7 as possible targets, and I think it is not far fetched that
8 another entity who is in the United States but with either a
9 Russian parent corporation or sister corporation and whose
10 assets might have Russian assets would raise the same defense
11 that Sberbank has done so today, and therefore we believe it
12 makes sense that one court, the District of Columbia, decide
13 those issues to prevent any inconsistent rulings.

14 THE COURT: I guess my concern, sir, is I would feel a
15 little more sanguine about your argument if I knew there were
16 other subpoenas that were in the offing that were going to
17 implicate the very issues that have brought these folks here
18 today. And I think what I'm hearing you to say is that it's a
19 possibility, in fact it may even be a strong possibility in
20 light of the FOIA request, but today there's nothing, correct?

21 MR. McCALLUM: There's not a draft subpoena in the
22 works right now, your Honor. But Mr. Serritella tries to
23 distinguish the Wultz case talking about other the things that
24 happened prior in the litigation, but the case was specifically
25 decided based on the fact they intended to subpoena additional

F8ITAGUA

1 entities. So while the court did have familiarity with the
2 issues, it was a future inconsistency that they were worried
3 about, and that is why the motion to transfer, not based on any
4 specific rulings that the court already made. The court did
5 note that Judge Scheindlin was deeply involved in the case and
6 familiar with the facts there, but that was not the basis for
7 the transfer.

8 THE COURT: Anything else you want to tell me about
9 either application before I hear the final word from
10 Mr. Serritella, who is dying to tell me something, I can tell?

11 MR. McCALLUM: With respect to the protective order, I
12 think your Honor is on it. We have a disagreement about the
13 appropriate standard there. We do submit that it's the ability
14 to access and gain that information, and that Sberbank is
15 interjecting additional requirements into the standard.

16 And with respect to the motion to transfer, we would
17 like to point out once again that Sberbank raised the question
18 of the different stages of the litigation. And as your Honor
19 pointed out, the case is still very much active. And while
20 Mr. Serritella states we have not provided any support for the
21 idea that Rule 45(f) contemplates the enforcement stage,
22 there's nothing that Rule 45(f) contemplates treating the
23 merits stage of litigation different from the enforcement
24 stage.

25 With that, your Honor, I rest.

F8ITAGUA

1 THE COURT: Thank you.

2 Mr. Serritella, are you going to let Mr. Meyer talk?

3 MR. SERRITELLA: I will respond, your Honor.

4 On the motion to transfer, a couple of points. One,
5 the plaintiff has had years to issue subpoenas. And while I
6 understand that they're saying that we're in the enforcement
7 stage, I believe the sanctions order was issued at least a
8 couple years ago.

9 THE COURT: 2013.

10 MR. SERRITELLA: So two years have gone by and they
11 issued one subpoena and a second one two weeks ago. So to say
12 that there are other subpoenas coming down the pike, it's all
13 conceptual and not even real.

14 Then secondly, with regard to the Wultz case, there
15 were two parties that were actually identified as deponents in
16 potential depositions; the plaintiffs or whoever the parties
17 were who were going to take those depositions, and those two
18 individuals were going to testify about the same issues that
19 were at issue in the motion to quash.

20 And secondly, there was an intervenor in that action.
21 The court, Judge Scheindlin, was going to oversee the first
22 deposition, so she was familiar with the issues and involved
23 with the actual deposition of the potential subpoenaed party.
24 So it's completely different than here where there is no
25 identified party with regard to an issue of access.

F8ITAGUA

1 And then I would just like to close by reiterating
2 that what this motion for protective order really turns on is
3 the legal standard of control. And control, just to reiterate,
4 does come down to access to the relevant information in the
5 ordinary course of business. And here the record makes very
6 clear that Sberbank USA does not have access in the ordinary
7 course of business to account level information of Sberbank of
8 Russia.

9 And to respond to a point made by my adversary, all
10 the information that they cite in their papers is not relevant,
11 it's stale news articles and reports regarding Sberbank CIB and
12 other affiliates in Russia that have no bearing on whether
13 Sberbank USA has access to account level information that the
14 plaintiff is seeking.

15 So the only thing that they cite to regarding our
16 client is a Linked In article of the declarant, Mr. Levy,
17 regarding coordination with affiliates, a four-word phrase and
18 a 250-word description at the very end of his Linked In
19 article. And I would posit that if coordination with
20 affiliates was the basis for getting access or a basis for
21 control with regard to other affiliates, that any entity that
22 was the subject of a discovery request would have to respond on
23 behalf of other affiliates, because affiliates always
24 coordinate for the cost efficiency purposes. Happens all the
25 time.

F8ITAGUA

1 So I would just leave your Honor with the point here
2 that a deposition is improper as a matter of law and would not
3 serve to provide the plaintiff with the information that it's
4 actually seeking because our client doesn't have the
5 information.

6 THE COURT: Thank you to both sides. I will step off
7 the bench for a few minutes and ask for your patience. Thank
8 you.

9 (Recess taken)

10 THE COURT: Let me begin by what will be cold comfort
11 to one table. This was really excellent oral argument today
12 and really strong briefing. And you don't know the run of the
13 mill cases that I get day after day. This is so much better
14 than much of the argument that I see, and so it was great for
15 me. If you could find more cases to bring my way, I would be
16 happy to have you argue any time. So take those compliments,
17 because they are sincerely felt. Thank you.

18 But I have already spent some time dealing with
19 looking at Rule 45(f) and looking at the advisory committee
20 notes to it, and I know that what the parties are in dispute
21 about is what constitutes exceptional circumstances, and I'm
22 aware of parties' arguments on that.

23 But one of the other things that the advisory
24 committee notes say is that it might be helpful to consult with
25 the judge in the issuing court in order to get his or her views

F8ITAGUA

1 on the situation, so I have done that. I have spoken with
2 Judge Lamberth. And I want to talk to you a little bit about
3 what he said. Why don't I cut to the chase and say I am
4 transferring this so you are not sitting at the edge of your
5 seat, but let me explain to you why.

6 This is in many respects a very special case; I think
7 it is to Judge Lamberth, and I understand why it is special to
8 him. It is a case for which he has presided for ten years.
9 And in this instance I'm perhaps less concerned about knowledge
10 of the history of the Bolshevik Revolution and the Foreign
11 Sovereign Immunities Act, but I am noting that he was with case
12 for a number of years. He issued a default judgment in 2010
13 because the Russian Federation participated and then they
14 didn't participate anymore. So on some level his authority was
15 flouted and his orders were flouted, and then we have a default
16 judgment. And then we got to the point of sanctions in 2013.
17 And again, it just sort of suggests that there's a flouting of
18 his authority and his orders.

19 He is allowed to be concerned about the next phase in
20 this litigation. He is allowed to be involved in the next
21 phase of the litigation. And what that phase is is an effort
22 to figure out where, if anywhere, there are assets in this
23 country that can be seized to satisfy that default judgment,
24 because it does not appear today that that library can be
25 seized or the other artifacts can be seized. I take

F8ITAGUA

1 Mr. Serritella's point that there have been years without
2 anything being done after the issuance of the default judgment,
3 and candidly, after the issuance of the sanctions order. That
4 said, I'm not faulting Judge Lamberth for that. He has the
5 ability and the right to make sure that this phase of the case
6 is administered in a way that minimizes the risk of
7 inconsistencies and does justice.

8 And therefore, on that front, taking Mr. McCallum's
9 point that there are more of these informational requests that
10 are likely to be coming out, and that given the structure of
11 this case, the issues of domestic and foreign access to
12 information and knowledge, which I find, by the way, very, very
13 interesting and not free from doubt, precisely because of the
14 fine arguments of the parties, I think those are interesting
15 issues and could come up again.

16 So for this reason, I find that his interests, the
17 interests of Judge Lamberth, which he communicated to me, are
18 more than conceptual, not real, as argued by Mr. Serritella,
19 and more than just an interest in judicial economy.

20 That said, I do want to minimize the cost to Sberbank
21 given the work they have done so far. And Mr. McCallum
22 indicated that that was something that could be done, and so
23 therefore it will be done. I'm going to ask that Chabad pay
24 for the transcript of this case, and they may consider an
25 expedited transcript to be better.

F8ITAGUA

1 I do not know if Judge Lamberth wishes to discuss this
2 at Thursday's conference or some other time, so I leave that
3 for the parties, but certainly you want to get to him the
4 transcript. I assume that plaintiff will work to ensure that
5 there are minimal burdens, if, for example, this could be done
6 telephonically. I certainly can ensure that Judge Lamberth
7 gets all the papers electronically so we don't have to do them
8 again. And if there's a deposition that's going to be ordered,
9 it will take place here.

10 So I think it is additional work for Sberbank. I
11 think we can work to minimize how much additional work it is.
12 And given that, and given the fact that I think this particular
13 case does present a species of the exceptional circumstances
14 that are contemplated by the advisory committee, and given my
15 conversations with Judge Lamberth about what he wishes to do
16 with the case, I am transferring the motion to him.

17 So I would like to have decided it. I appreciate very
18 much your getting the information to me, and I will work now to
19 ensure that he deals with it as promptly as possible.

20 Thank you so much for coming in today, and I will let
21 you get the transcript. Thank you.

22 o0o